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Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI, and OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

MARK A. BORENSTEIN
OVERLAND BORENSTEIN
SCHEPER & KIM LLP
300 South Grand Ave.
Suite 2750
Los Angeles, CA 90071
Telephone: (213) 613-4655
Facsimile: (213) 613-4656

Attorneys for Petitioners Mark E. Overland, Pamela Poloski, and Overland & Borenstein LLP

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a county government and a state superior court appropriate for their own use the interest actually earned on a cash deposit in lieu of bail, does the confiscation of the interest constitute a taking of private property under the Fifth and Fourteenth Amendments of the United States Constitution as applied in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), such that the county and the superior court must pay just compensation to the depositor under *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), if any compensation is due?

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PETITION FOR A WRIT OF CERTIORARI

Mark A. Borenstein, *Overland Borenstein Scheper & Kim LLP*, on behalf of *Mark E. Overland, Pamela Poloski and Overland & Borenstein LLP*, petitioners for a writ of certiorari to review the judgment of the California Court of Appeal following denial of review by the Supreme Court of the State of California.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 126 Cal. App. 4th 131, 23 Cal. Rptr. 3d 676, *review denied*, May 11, 2005, and is reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. 1-17.

JURISDICTION

On January 28, 2005, the California Court of Appeal entered its decision. On March 9, 2005, Petitioners timely filed for review in the California Supreme Court. On May 11, 2005, the California Supreme Court denied review. Pet. App. 18. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The relevant sections of the California Penal Code are also reprinted in the Appendix. Pet. App. 19-20.

STATEMENT OF THE CASE

Factual Background

California, just like every state and the District of Columbia,[1] satisfies the state and federal constitutional

[1] Ala. Code §§ 15-13-40, 15-13-111 & 15-13-158 (ALABAMA 2005); Alaska Stat. §12.30.020 & Alaska Rules of Court, Rules 41 & 43(d) (ALASKA 2005); Ariz. Rev. Stat. Rules Crim. Proc., Rule 7.1 (ARIZONA 2005); Ark. Code Ann. §16-84-115 (ARKANSAS 2005); Cal. Penal Code §§ 1295-1298 (CALIFORNIA 2005) (accrued interest, if directed by county, for benefit of courts); Colo. Rev. Stat. §§ 16-4-104 & 16-4-109 (COLORADO 2005); Conn. Gen. Stat. §§ 54-53 & 54-66 (CONNECTICUT 2005); Del. Code Ann. tit. 11, §§ 2102 & 2104 (DELAWARE 2005); D.C. Code Ann. §23-1321 (DISTRICT OF COLUMBIA 2005); Fla. Stat. ch. 903.16 & 903.17 (FLORIDA 2005); Ga. Code. Ann. §17-6-4 (GEORGIA 2005); Haw. Rev. Stat. §804-11.5 (HAWAII 2005); Idaho Code §19-2921 (IDAHO 2005); 725 Ill. Comp. Stat. §5/110-8 (ILLINOIS 2005); Ind. Code §35-33-8-3.2 (INDIANA 2005); Iowa Code §§ 811.1 & 811.2 (IOWA 2005); Kan. Stat. Ann. §§ 22-2802 & 22-2808 (KANSAS 2005); Ky. Rev. Stat. Ann. §§ 431.520, 431.530 & 431.535 (KENTUCKY 2005); La. Code Crim. Proc. Ann. Art. 324 (LOUISIANA 2005); Me. Rev. Stat. Ann. tit. 15, §§ 1026 & 1074 (MAINE 2005); Md. Code Ann., Criminal Procedure §5-205 (MARYLAND 2005); Md. Rules, Criminal Clauses, Rules 4-216 & 4-217 (MARYLAND 2005); Mass. Gen. Law. ch. 276, §§ 68 & 79 (MASSACHUSETTS 2005); Mich. Comp. Laws §§ 765.6c, 765.12, 765.13 & 765.17 (MICHIGAN 2005) ("Any interest accumulating . . .

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right to be free from excessive bail[2] by enacting a statutory bail system under which a cash deposit in lieu of bail may

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shall be paid into the general fund") (cash bail deposits subject to $10 administrative fee); Minn. Stat. §§ 629.16 & 629.53 (MINNESOTA 2005); Miss. Code Ann. §99-5-9 (MISSISSIPPI 2005); Mo. Rev. Stat. §§ 544.040 & 544.455 (MISSOURI 2005); Mont. Code Ann. §§ 46-9-401 & 46-9-502 (MONTANA 2005); Neb. Rev. Stat. §29-201 (NEBRASKA 2005); Nev. Rev. Stat. §178.502 (NEVADA 2005); N.H. Rev. Stat. Ann. §§ 597:2 & 597:3 (NEW HAMPSHIRE 2005) ("All money deposited for bail shall be held for the use of the state until the clerk of the superior court where the bail is deposited shall certify that no liability exists against the bail."); N.J. Stat. Ann. §3:26-4 (NEW JERSEY 2005); N.M. Stat. Ann. §5-401 (NEW MEXICO 2005); N.Y. Crim. Proc. Law §§ 500.10, 520.10 & 520.15(c) (NEW YORK 2005) ("Money posted as cash bail is and shall remain the property of the person posting it unless forfeited to the court"); N.C. Gen. Stat. §§ 15A-531 & 15A-534 (NORTH CAROLINA 2005); N.D. Rules Crim. Proc., Rule 46 (NORTH DAKOTA 2005); Ohio Rev. Code Ann. §§ 2937.22 & 2937.41 (OHIO 2005); Okla. Stat. tit. 22 §1106 (OKLAHOMA 2005); Or. Rev. Stat. §135.265 (OREGON 2005); Pa. Stat. Ann. tit. 234 §§ 528 & 535 (PENNSYLVANIA 2005); R.I. Gen. Laws §12-13-10 (RHODE ISLAND 2005); S.C. Code Ann. §§ 17-15-190 & 17-15-220 (SOUTH CAROLINA 2005); S.D. Codified Laws §§ 23A-43-2 & 23A-43-3 (SOUTH DAKOTA 2005); Tenn. Code Ann. §§ 40-11-116 & 40-11-119 (TENNESSEE 2005); Tex. Crim. P. Code Ann. §§ 17.01, 17.03, 17.42 & 22.16 (TEXAS 2005) (surety entitled to accrued interest less costs following forfeiture); Utah Code Ann. §77-20-4 (UTAH 2005); Vt. Stat. Ann. tit. 13 §7554 (VERMONT 2005); Va. Code Ann. §§ 19.2-119 & 19.2-123 (VIRGINIA 2005); Wash. Rev. Code §10.19 (WASHINGTON 2005); option of cash deposit not specified in state code, but local rules make reference to presumption of cash bail, *see, e.g.*, Bellingham Municipal Court, Local Court Rules, Rule 15 (WASHINGTON 2005); Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) Rule 3.2 (2005); W. Va. Code §§ 62-1C-2 & 62-1C-12 (WEST VIRGINIA 2005); Wis. Stat. §§ 969.001 & 969.03 (WISCONSIN 2005); Wyo. R. Cr. P. 46, Rule 46.1 (WYOMING 2005). All dates are from electronic databases.

[2] *See Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or

be posted with the superior court or a county government. The cash deposit is held as security for a criminal defendant's appearance, and is exonerated and returned to the original depositor after the defendant appears. Cal. Penal Code §1297. The period of time during which the cash deposit is held is often many months or in the case of one of the Petitioners, more than a year. In Los Angeles County alone, there are more than 1 million cash bail depositors subject to this litigation. Respondents have returned the principal amount of the cash to each depositor, but have not paid to the depositors any portion of the millions of dollars in interest actually earned on the cash deposits. All 57 counties in California engage in the same practice, and Petitioners believe actual earned interest is not paid to cash depositors in any state.

In this case in three separate criminal prosecutions in the Los Angeles County Superior Courts, Petitioners deposited cash in lieu of bail to secure the appearance of three defendants. On September 21, 2000, Petitioner Overland deposited $500,000; on December 20, 2002, Petitioner Poloski deposited $35,000; and on July 12, 2003, Petitioner Overland & Borenstein deposited $250,000. *Overland v. Superior Court*, 126 Cal. App. 4th 131, 134-35 (2005); Pet. App. 2-4.

In each case, the clerk of the superior court transferred the cash deposit to the Los Angeles County's auditor-controller, who deposited the money into a County trust fund called the "TK7 Trust Fund." The County of Los Angeles invested the cash bail deposits and during the

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the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.") (internal citations omitted).

time period which is the subject of this action, earned an annual rate of return on the deposited cash between 2.45% and 6.38%. The interest actually earned was transferred to the Los Angeles County General Fund for general fiscal purposes. The cash was held for a few months for two of the Petitioners; the Overland deposit was held for more than a year and likely earned nearly $25,000 in interest. *Id.*

When the cash deposited in each case was exonerated by court order, the superior court clerk requested the County auditor-controller to transfer the cash bail deposits from the TK7 Trust Fund for return to the original depositors, as required by California Penal Code section 1297. In two cases, the auditor-controller transferred the cash to the clerk, who then wrote checks to Petitioners for the principal amount of the cash deposits, without any of the actually earned interest. In the case of the $250,000 cash deposit of Overland & Borenstein, the County auditor-controller issued and mailed a county warrant for the principal amount, without any interest. *Id.*

Each Petitioner demanded the interest earned on the bail from the date of deposit to the day it was exonerated, and from the date of exoneration to the date the deposit was refunded to the Petitioners. No interest payments have been made to Petitioners despite their demands. *Id.*

Proceedings Below

On September 26, 2003, Petitioners filed a complaint in the Superior Court of the County of Los Angeles against the Respondents alleging, among other claims, the unlawful taking of the actually earned interest on their cash bail deposits without compensation in violation of the Fifth

and Fourteenth Amendments to the United States Constitution, and the corresponding state constitutional provisions. *See* Cal. Const. Art. I, §§ 7 and 19. The claims included demand for accrued interest both before exoneration of the cash deposit, and after exoneration. Petitioners brought the action on behalf of themselves and for all persons similarly situated. *Id.* at 126 Cal. App. 4th at 135; Pet. App. 4-5.

The Superior Court and its Clerk moved for judgment on the pleadings or, in the alternative, demurred to all claims asserted against them. On March 17, 2004, the trial court overruled the demurrer to the second cause of action (relating to post-exoneration interest), but otherwise sustained the demurrer without leave to amend with regard to the first cause of action, for pre-exoneration interest. This decision by the trial court also applied to Respondent County of Los Angeles. *Id.*

On March 24, 2004, Petitioners filed a petition for writ of mandate seeking review of the trial court's order sustaining the demurrer to their first cause of action without leave to amend. *Id.*

After ordering briefing and hearing argument, the Court of Appeal on January 28, 2005, denied the petition. It held that the decisions of this Court in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) were inapplicable because they involved an "involuntary" taking of the interest earned on cash deposits, whereas in this case, Petitioners' cash deposit was "voluntary," part and parcel of an implied unwritten contract. According to the California court, the contract was implied

from California statutes which did not "mandate the payment of interest on cash bail deposits." *Overland v. Superior Court*, 126 Cal. App. 4th at 141-142; Pet. App. 13-16.

On May 11, 2005, the California Supreme Court denied discretionary review. Pet. App. 18. Accordingly, under Rule 13-1, this Petition is timely.

SUMMARY OF ARGUMENT

This Court has repeatedly held that interest earned on a cash deposit – whether an IOLTA Trust deposit, state court interpleader deposit or otherwise, is property of the depositor separate from the principal amount of the cash deposit. When the state appropriates the depositor's accrued interest, the state effects a *per se* physical taking under the Fifth Amendment, for which reasonable compensation, if any, is due. In *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980), the property categorically taken was the interest earned on an interpleader deposit. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the property taken was the interest actually earned on IOLTA trust accounts. In these cases, as in others, the cash deposit was not compelled and in each case, the depositor arguably obtained a benefit from making the cash deposit. But in each case, the earned interest was involuntarily taken under rules or statutes adopted by the state. The Court of Appeal decision here conflicts with these relevant decisions on a very important Fifth Amendment question that literally affects

millions of people and likely involves hundreds of millions of dollars in confiscated interest around the country.

Contrary to *Webb's Fabulous Pharmacies*, *Phillips* and *Brown*, the California Court of Appeal held Respondents did not engage in an unconstitutional taking by retaining interest earned on Petitioners' cash bail deposit. Rather, the Court of Appeal decided the taking of the interest earned on the cash was authorized by a state law contract implied from the bail statutes under which the depositor impliedly waived return of the interest. In so doing, the Court of Appeal used state law to transfer ownership of the earned interest in exactly the same way the lower courts in Florida relied on a state statute to justify the taking of the interest earned on interpleader deposits in *Webb's Fabulous Pharmacies*. In fact, the case against an unlawful confiscation was stronger in *Webb's Fabulous Pharmacies* since there was nothing the lower Florida courts needed to imply. Unlike here, the lower courts in Florida permitted the taking of the interest based expressly on a Florida statute that was clear on its face that the interest would be retained by the court. Nevertheless, this Court found the taking of the interest violative of the Fifth Amendment.

Under the Fifth and Fourteenth Amendments, Petitioners' constitutional rights against the taking of private property without just compensation may not be abrogated either by characterizing the earned interest as subject to an express statutory mandate, or an implied-in-statute contract. The interest belongs to the depositor and taking it without just compensation offends the Fifth Amendment. Accordingly, this Court should grant this petition for certiorari under Rule 10(c) of the United States Supreme

Court Rules and address the conflict created by the Court of Appeal.

ARGUMENT

I. THE INTEREST ACTUALLY EARNED ON A CASH DEPOSIT IS THE PRIVATE PROPERTY OF THE DEPOSITOR; WHEN A COUNTY OR COURT KEEPS THE INTEREST, IT EFFECTS A *PER SE* TAKING OF PROPERTY SUBJECT TO THE TAKINGS CLAUSE.

In order to establish a claim for an unconstitutional taking of property, Petitioners must first show the property taken is their private property. *See Ruckleshouse v. Monsanto Co.*, 467 U.S. 986, 1000-1001 (1984); *Phillips*, 524 U.S. at 164. Here, Petitioners possess a property interest that is constitutionally protected. Petitioners deposited private property – cash – in lieu of bail according to the California Penal Code regulations governing bail and bail substitutes. *See, e.g.*, Cal. Pen. Code §1296. Under the bail statutes, the cash deposit remains the private property of the Petitioners, which is held as security for the appearance of the defendant at criminal proceedings. By statute, the property must be returned to the depositor when the bail is exonerated. Cal. Pen. Code §1297. The depositor is not dispossessed of ownership of the cash deposit unless and until a defendant fails to appear and the deposit is forfeited pursuant to a rigorous and lengthy judicial process. Cal. Pen. Code §1305 *et seq.*

Since the cash principal is the private property of the Petitioners, so too is the interest actually earned on cash bail deposit. Beginning with *Webb's Fabulous Pharmacies*

v. Beckwith, 449 U.S. at 161, this Court has consistently held that the interest earned on a cash deposit is the property of the depositor under the "interest follows principal" rule. The principal which earned the interest remains the property of the depositor and as a result, so does the earned interest. *Phillips v. Washington Legal Found.*, 524 U.S. at 172. *See Anderson v. Spear*, 356 F.3d 651, 670 (6th Cir. 2004) (leftover campaign contributions); *Schneider v. California Dep't of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003) (interest on prisoner deposits cannot be appropriated for benefit of entire prison population); *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003) (same); *Ill. Clean Energy Cmty. Found. v. Filan*, 2004 U.S. Dist. LEXIS 7615, 30-32 (N.D. Ill. 2004) (contributions to public trust); *Arthur v. District of Columbia*, 857 A.2d 473, 492 (D.C. Ct. of App. 2004) (appropriation of interest on interpleader funds deposited into court registry constitutes an unconstitutional taking); *Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct. 2003) (dividends on stock temporarily held by state).

In *Webb's Fabulous Pharmacies*, this Court decided that a state violated the Takings Clause when it appropriated for itself, pursuant to state statute, the interest accrued on an interpleader fund deposited in the registry of a county court. "The usual and general rule is that any interest on the interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. at 162. *Brown* declared that the confiscation of the interest accrued on temporary

cash deposits is a *per se* taking[3] under the Fifth Amendment, because the accrued interest was physically taken:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [citation], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

Brown, 538 U.S. at 233. In *Phillips*, 524 U.S. at 172, this Court held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."

Here, Petitioners made cash deposits. Like in *Webb's Fabulous Pharmacies*, the cash deposits were held temporarily by the state, and while temporarily held, the deposits earned interest, in this case in the Los Angeles County TK7 Trust Fund. In addition, like *Webb's Fabulous Pharmacies* where the interest actually earned on the cash was kept by the circuit court, here interest was transferred to the Los Angeles County General Fund for general fiscal purposes. In *Webb's Fabulous Pharmacies*, the state statute declared the interest to be "income of the office of the clerk," *id.* at 449 U.S. 156 note 1; in this case, the Court of Appeal determined the interest was owned by the County and Court since the bail statutes did not expressly require the interest be paid to the depositor. *Overland v. County of Los Angeles*, 126 Cal. App. 4th at 141-142; App. 15. But just as in *Webb's Fabulous Pharmacies*, *Brown* and

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[3] The Legislature may impose a reasonable user fee for costs reasonably related to handling and returning cash bail, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 163, but the California Legislature has not chosen to do so. *See infra* Section III.

Phillips, the principal amount of the cash deposit is the property of the depositor. Because the interest follows this principal, the interest belongs to the depositor, regardless of the reason given by the lower court to transform the private property to public ownership.[4]

That the interest actually earned on a cash bail deposit is the private property of the depositor is not a new or novel proposition, even in California. The Court of Appeal previously considered the application of the Takings Clause to cash bail deposits in *Fresno Fire Fighters v. Jernagan*, 177 Cal. App. 3d 403 (1986). In that case, the Court of Appeal determined that "the public purpose of bail justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court," *id.* at 177 Cal. App. 3d at 412, thereby necessarily acknowledging the depositor's private property ownership in both the principal and the interest. By concluding the County's taking of the accrued interest was merely an *interference* with the beneficial ownership of the cash deposit that was justified by the public purpose of bail, the *Fresno Fire Fighters* court employed a classic regulatory takings analysis based on *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and *Andrus v. Allard*, 444 U.S. 51 (1979), both of which were expressly cited in the *Fresno Fire Fighters* decision. *See Fresno Fire Fighters*, 177 Cal. App. 3d at 412.

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[4] Because these proceedings result from the sustaining of a demurrer without leave to amend, there is no occasion for the Court to decide whether compensation in some amount is due. After the threshold issue – whether private property was taken – is finally decided, the trial court must decide if any compensation must be paid. *Phillips*, 524 U.S. at 173.

But the *rejection* of that ad hoc balancing of public and private interests – the hallmark of a regulatory takings analysis – was at the core of *Brown*. The Supreme Court unanimously agreed in *Brown* that the interest actually earned was categorically taken when appropriated by the government for public use; it was not merely an interference with the beneficial use of the depositor's money. *Brown*, 538 U.S. at 235 ("We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central's* [*Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978)] ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts is the private property of the owner of the principal.") (majority opinion); *Brown*, 538 U.S. at 241-252 (agreeing with *per se* analysis but rejecting majority's determination that no compensation was due) (dissenting opinion).

Fresno Fire Fighters, of course, was decided without the benefit of either *Brown* or *Phillips*. The regulatory takings analysis employed in *Fresno Fire Fighters*, under which the court balances the public interest against the interference with the owner's property, has now been discarded when the property taken by the government is interest earned on a principal sum. If *Fresno Fire Fighters* was decided today in light of *Brown*, the *Fresno Fire Fighters* court should have concluded the confiscation of the depositor's accrued interest was a taking of private property.

The Court of Appeal in this case, however, essentially ignored the reasoning of the *Fresno Fire Fighters* court, asserting instead that "the *Fresno* decision overlooked applicable contract law principles." *Overland v. Superior Court*, 126 Cal. App. 4th at 142; App. 16. Nothing was

"overlooked." The *Fresno Fire Fighters* court recognized the constitutional takings issue and evaluated the challenge on the basis of Fifth Amendment jurisprudence then in effect. *Fresno Fire Fighters*, 177 Cal. App. 3d at 411-13. However, it did so under Fifth Amendment principles that, after *Brown* and *Phillips*, have changed.

II. THE CALIFORNIA COURT OF APPEAL'S APPROACH MISINTERPRETS THIS COURT'S TAKINGS JURISPRUDENCE AND IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS.

The presence or absence of statutory authority directing the disposition of interest earned on funds deposited with a governmental entity does not determine the constitutionality of the disposition. *Webb's*, 449 U.S. at 162. The state "by *ipse dixit* may not transform private property into public property without compensation." *Id.* at 164. This prohibition applies regardless of how the state acts, whether by judicial decrees or legislation. *Id.* In *Schneider v. California Dep't of Corrections*, 151 F.3d 1194 (9th Cir. 1998), for example, the Ninth Circuit held that a state law that required the interest actually earned on inmate trust funds to be paid to the Department of Corrections does not insulate the state from an unconstitutional taking. *Schneider* quoted the "*ipse dixit*" language from *Webb's Fabulous Pharmacies*, and then wrote that a statute expressly appropriating the interest does not insulate the state from the Fifth Amendment:

> [I]n *Phillips*, [the Court] refused to accord the Texas IOLTA rules – which purported to divest clients of ownership of the interest income in IOLTA accounts – any talismanic significance.

> Rather, the Court reiterated that 'a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.' The *Webb's* and *Phillips* decisions are therefore similar to one another (and germane to this case) in a critical respect: In both cases, the Court relied, in the face of a contrary state statute, upon the traditional common law rule that 'interest follows principal' in recognizing a protected property interest in earned interest income.

Id. at 1200.[5]

Here the case for the taking of private property under the Fifth Amendment is even stronger since there was no statute that expressly appropriated the interest on cash bail deposits.[6] Instead, the Court of Appeal *implied* a right for the County and the Court Clerk to take the accrued interest based on an implied contract that supposedly arises from the bail statutes. According to the Court of Appeal, since the statutes did not require the payment of the interest on a cash deposit to the depositor, the County and the Court could retain the earned interest in the absence of an express agreement to the contrary. *Overland v. Superior Court*, 126 Cal. App. 4th at 141-142; App. 15. The California court, in effect, substituted a purported unwritten implied contract based on statute for the express

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[5] Following remand, the Ninth Circuit reaffirmed that under *Brown*, "it is clear under [the] *per se* analysis that California's scheme perpetuates a taking because it appropriates the interest earned by the ITA's and allocates them for public use." *Schneider v. California Dep't of Corrections*, 345 F.3d at 720.

[6] And stronger still since there is no constitutional right to an interpleader deposit, whereas there is a constitutional right to bail.

statutory authorizations found ineffective to avoid the Fifth Amendment in *Webb's Fabulous Pharmacies*, *Phillips* and *Schneider*. A state statute cannot convert private property into public property; nor can a judicial opinion purporting to create an implied-in-statute contract do so.

It makes no difference for Fifth Amendment purposes whether the state takes the accrued interest based on an express statute or based on an implied-in-statute contract. If the California legislature had enacted a bail provision that expressly declared the interest earned to be the income of the County or the Clerk, the result would be no different.[7] No matter the device used by the state to appropriate the interest earned on the cash deposit, it is still the private property of the depositor taken for a public use.

Even so, there is nothing contractual about a cash bail deposit. The California legislature identified the rights and responsibilities of a depositor in great detail. The Penal Code describes how the deposit is to be made, when it is to be returned, and how the cash is forfeited and ownership transferred to the state. *See* Cal. Penal Code §§ 1295-1298; 1305-1308. When the Legislature intended to create contractual obligations by statute in connection with bail or cash deposits, it did so expressly. For example, when cash deposits are made in lieu of a required undertaking, the Legislature directed the depositor to execute

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[7] In fact, the California legislature has enacted such a statute. *See* Cal. Govt. Code §53647.5 ("Notwithstanding any other provision of law, interest earned on any bail money deposited in a bank account pursuant to Section 1463.1 of the Penal Code and Section 53679 of this code shall, if the board of supervisors so directs, be allocated for the support of the courts in that county.") In this case, the Los Angeles Board of Supervisors has not "so direct[ed]," even though it would not affect the constitutional analysis if the Board did.

an agreement that specifies when and how the cash deposit may be forfeited. Cal. Civ. Proc. Code §995.710(c). When the Legislature authorized a bail bond as security for a defendant's bail, it expressly directed the surety to enter into a written agreement concerning how and when the surety would be exonerated or the bond forfeited. Cal. Penal Code §§ 1278, 1287 and 1459. In contrast, there is no contract language in any of the cash deposit statutes.

Even assuming a contract was implied,[8] the court below created the wrong implied agreement from the absence of any statutory language specifying who earns the interest. Since the property that earns the interest is owned until forfeiture by the depositor, the implied obligation should have been, if there was one at all, that the owner of the property keeps the interest, not the Clerk or the County, who are mere custodians of the security. That is surely consistent with the *Fresno Fire Fighters'* analysis of the civil deposit, *Fresno Fire Fighters*, 177 Cal. App. 3d at 406-408, the Supreme Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, and the very contract principles which the court below trumpeted in support of its decision.

The California court's finding of an implied waiver of a right to compensation from the taking of the accrued interest is contrary to this Court's established precedent on constitutional waivers. An effective waiver must be made knowingly, intelligently and voluntarily. *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 185

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[8] If there is an implied contract, it is a very odd one, lacking any of the hallmarks of a contract. For example, here the depositor had no ability to negotiate any of the contract terms.

(1972). An implied waiver, by definition, cannot be knowingly and intelligently made. The implied contract found by the California court does not provide average depositors with specific notice that they are forfeiting their constitutionally protected property right in the interest earned on their deposit. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Sav. Bank v. Florida Prepaid Secondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (citations omitted).

Moreover, there have been many cases challenging a state's decision to appropriate interest actually earned on cash deposits when the depositor knew the state claimed it did not have to pay interest. That was certainly the circumstance in *Brown*, in *Webb's Fabulous Pharmacies*, in *Schneider v. California Dep't of Corporations*, 345 F.3d 716, and in *McIntyre v. Bayer*, 339 F.3d 1097. Yet none of these decisions found an implied waiver of the constitutional right to just compensation when private property is appropriated for public use.

The reason is obvious: There can be no waiver of a constitutional right absent "an intentional relinquishment or abandonment of a known right or privilege." *People v. Mancheno*, 32 Cal.3d 855, 864 (1982) (no implied waiver to terms of plea bargain) *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See also People v. Taylor*, 31 Cal.3d 488, 497 (1982) (no implied waiver of right to civilian clothing at trial); *People v. Douglas*, 61 Cal.2d 430, 434 (1964) (no implied waiver of counsel). In this case, there is nothing in the record or the Court of Appeal decision that demonstrates an intentional relinquishment of the Fifth Amendment protection against taking of property without compensation.

Furthermore, the California court's analysis that there is no unconstitutional taking of interest because the initial deposit of the principal is "voluntary" is likewise fundamentally flawed. The voluntariness of the initial deposit is irrelevant to the subsequent involuntary taking of the interest thereon. As stated by the appellate court in *Arthur v. District of Columbia*, 857 A.2d at 492, n. 23:

> the District's argument that Mr. Arthur voluntarily deposited $14,450.00 in the court registry, and hence the takings clause does not apply, is unavailing. While Mr. Arthur voluntarily deposited the $14,450.00 . . . he did not by that action signal that the government had a right to take and use private funds resulting from the sale of private property, including interest thereon, in any way it deemed necessary or appropriate.

Likewise, the deposit of cash in lieu of bail was not a signal that the Superior Court and the County of Los Angeles had a right to take the interest on that cash deposit for their own use.

III. THE TAKING OF THE INTEREST IS NOT A REASONABLE FEE FOR SERVICES RENDERED.

Petitioners agree that a state legislature may assess a user fee on cash bail deposits that is "reasonably related to the costs of using the courts." *Webb's Fabulous*, 449 U.S. at 163. But in California and likely elsewhere, such fees *only* can be imposed by the Legislature and Governor, by statute. *See, e.g.*, Cal. Civ. Proc. Code §116.230 and Cal. Gov't Code §§ 26820-26826 and 26827-26863. *See also* Assembly Bill No. 1759 (Chapter 159), approved by the Governor, Aug. 2, 2003 (establishing new fees and increasing

existing fees as an urgency measure). *See Vance v. Barrett*, 345 F.3d 1083, 1089 (9th Cir. 2003) ("[w]ithout a statutory mandate, prison officials had no authority to confiscate inmates' property"). To impose a fee without statutory authority would violate due process. *Id.* at 345 F.3d at 1090-91 ("[w]ithout underlying authority and competent procedural protections, NDOP could not have constitutionally confiscated the net accrued interest"). *See Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985) (administrative agency has no right without underlying statutory authority to enforce forfeitures of property; "when it does so, it violates the due process clause").

A user fee must bear a reasonable relationship to the "costs of administering the . . . cash bail program." *Buckland v. County of Montgomery*, 812 F.2d 146, 148 (3rd Cir. 1987). *See Phillips*, 524 U.S. at 171; *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (user fee must be a "fair approximation of the cost of benefits supplied"). Here, Respondents propose a user fee equal to 100% of the interest actually earned, an exaction that has no rational relationship between any identifiable costs and the interest actually earned. The interest actually earned depends on the amount of cash deposited, the rate of interest and the length of time the cash remained temporarily in the possession of Respondents. The total amount of interest could vary from a few dollars to many thousands of dollars, as is the case with the interest earned on Petitioner Overland's cash deposit. Yet there is no showing that the cost to administer cash bail deposits (or to calculate the interest actually earned on the cash deposit) is any greater for the Overland deposit of $500,000, than it is with a cash deposit for an alleged traffic violator who posted a small amount of cash which was held for a few months.

In any event, the California Legislature has not authorized any user fee.[9] Respondents may believe the Legislature authorized an *implied* user fee (much like the *implied* waiver or *implied* contract). But there can be no user fee by implication. The Legislature may enact a reasonable user fee in the future for prospective cash bail depositors. But the taking of the depositor's entire accrued interest without just compensation as an implied user fee offends the Fifth Amendment.

CONCLUSION

This Court has repeatedly stated that interest earned on principal is the private property of the depositor. When the State appropriates the interest actually earned on the temporary deposit of the principal for a public purpose, the Fifth Amendment is implicated. This action by the State is a *per se* confiscation that requires the trial court to determine what compensation, if any, is due to the owner. The California Court of Appeal's implied contract theory, under which the depositor impliedly agreed to forego accrued interest because there is nothing in the cash bail statutes that directs that interest must be returned to the depositor, disregards established precedent of this Court. Furthermore, the failure of the California Legislature to explicitly require payments of that interest does not relive the

[9] Michigan appears to assess a user fee for cash bail deposits, a flat fee of $10. *See* Mich. Comp. Laws §765.12a (2005). Michigan also directs that any "interest accumulating upon such fund [where cash is deposited] shall be paid into the general fund or corresponding fund of the state, county, city, village or township." Mich. Comp. Laws §765.17 (2005).

judiciary of its constitutional obligation either to eliminate the taking (return the interest with the principal) or order just compensation be paid. In light of the widespread practice of taking accrued interest on cash bail deposits, in California and in every state, and given the enormous amounts of interest actually taken, the petition for a writ of certiorari should be granted to decide this important Fifth Amendment issue that conflicts with relevant decisions of this Court.

Respectfully submitted,

OVERLAND BORENSTEIN SCHEPER & KIM LLP
MARK A. BORENSTEIN
Attorneys for Petitioners Mark E. Overland, Pamela Poloski, and Overland & Borenstein LLP

Filed 1/28/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARK E. OVERLAND et al., Petitioners, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE COUNTY OF LOS ANGELES et al., Real Parties in Interest.	B175442 (Los Angeles County Super. Ct. No. BC302996)

ORIGINAL PROCEEDINGS in mandate. Derek W. Hunt, Judge. Petition denied.

Overland Borenstein Scheper & Kim and Mark A. Borenstein for Petitioners.

No appearance for Respondent.

Morrison & Foerster, John W. Alden, Jr. and Cynthia L. Gillette for Real Parties in Interest.

Petitioners Mark E. Overland (Overland), Overland & Borenstein LLP (O & B) and Pamela A. Poloski (Poloski) (collectively, petitioners), seek a writ of mandate directing respondent superior court to vacate its order sustaining a

demurrer to their first cause of action without leave to amend and to enter an order overruling the demurrer.

The real parties in interest are the Los Angeles County Superior Court and John A. Clarke, the court's executive officer and clerk (clerk) (collectively, the court defendants).

The issue presented is whether the court defendants' refusal to pay the petitioners pre-exoneration interest on their cash bail deposits constitutes a taking of private property for public use for which petitioners are entitled to just compensation.

We conclude the court defendants' refusal to pay petitioners pre-exoneration interest on their cash bail deposits does not constitute a "taking" because there was no confiscation of private property by the court defendants for a public purpose, or at all. Rather, when petitioners voluntarily deposited cash bail to free the criminal defendants from custody, petitioners entered into contracts with the government by which petitioners guaranteed the appearance of the criminal defendants released on bail at all required court proceedings. The terms of the contract did not include a provision for payment of pre-exoneration interest. Therefore, petitioners cannot state a claim based on the court defendants' refusal to pay such interest. The petition for writ of mandate is denied.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background.*

Overland posted cash bail in the amount of $500,000 by way of a cashier's check to secure the appearance of Abdul Aziz Mohd Alkhelaifi in *People v. Alkhelaifi* (Super.

Court L.A. County, No. BA206456). The cash bail was posted with the Los Angeles County Sheriff's Department at the Inmate Reception Center at the Los Angeles County Jail. The sheriff then transferred the $500,000 to the clerk, who deposited the bail money with the County's auditor-controller into the Los Angeles County TK7 Trust Fund on September 21, 2000.[1] On June 19, 2001, the $500,000 bail was exonerated by court order. On July 20, 2001, the clerk requested the auditor-controller to transfer the $500,000 from the TK7 Trust Fund to the clerk's "Special Trust Fund" for return of the cash bail to Overland. The auditor-controller effected the transfer on July 26, 2001. The clerk then wrote a check to Overland, which was mailed to him on August 3, 2001. When Overland received the $500,000, he made repeated requests for interest on the deposited money from the date Alkhelaifi's bail was posted to the day it was exonerated and from the date of exoneration to the date the money was returned to him. No interest was ever paid.

Pamela Poloski deposited cash bail on December 20, 2002, in the amount of $35,000 by way of cashier's check to secure the presence of Robert Poloski in *People v. Robert Alan Poloski* (Super. Ct. L.A. County, No. PA042651). The procedures followed in the *Alkhelaifi* case also were used in the *Poloski* action. On February 10, 2003, the complaint against Robert Poloski was dismissed and the $35,000 bail was exonerated. Poloski did not receive the $35,000 back until March 26, 2003. She received no interest on the bail deposit from the date she deposited the bail to the date the

[1] Money deposited into the TK7 Trust Fund earns interest which is deposited into the Los Angeles County General Fund for general fiscal purposes.

bail was exonerated, or from the date of exoneration to the date the money was actually returned to her.

O & B is a law firm which, on July 12, 2003, deposited cash bail in the amount of $250,000 by way of a cashier's check to secure the appearance of Leonard McSherry pending his appeal of a misdemeanor judgment entered against him in *People v. Leonard James McSherry* (Super. Ct. L.A. County, No. 3BH00547-01). The $250,000 bail was exonerated on July 25, 2003. The cash bail was returned to O & B on September 5, 2003, without interest.

2. *Proceedings.*

On September 26, 2003, all three petitioners filed a complaint against the court defendants and others[2] for "unlawful taking without compensation; unjust enrichment; injunctive relief; declaratory relief and petition for writ of mandate to compel payment of interest." They brought the action on behalf of themselves and for all persons similarly situated.

The complaint's first cause of action pled an "unlawful taking of property without compensation against all defendants – interest earned between deposit and exoneration."

The second cause of action alleged an "unlawful taking of property without compensation against all

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[2] In addition to the court defendants, the named defendants include the County of Los Angeles, the Los Angeles County Board of Supervisors, and the County Auditor-Controller (collectively, the county defendants).

defendants – interest earned between exoneration and return."

Additionally, the complaint pled a cause of action for unjust enrichment, and requested injunctive and declaratory relief, as well as a writ of mandate directing defendants to pay interest on cash bail deposits.

The court defendants filed a motion for judgment on the pleadings or, in the alternative, demurrers to all claims asserted against them in the complaint. The matter was heard in the Orange County Superior Court. On March 17, 2004, the trial court overruled the demurrer to the second cause of action (relating to post-exoneration interest), and otherwise sustained the demurrers without leave to amend. With regard to the first cause of action, for pre-exoneration interest, the trial court ruled *Fresno Fire Fighters v. Jernagan* (1986) 177 Cal.App.3d 403 (*Fresno*) controlled and precluded an award of interest. As to the second cause of action, for post-exoneration interest on bail, the trial court determined the *Fresno* case did not control.[3]

Petitioners thereafter brought the instant petition for writ of mandate on March 24, 2004, seeking review of the trial court's order sustaining the demurrer to their first cause of action without leave to amend. We issued an order to show cause.

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[3] Petitioners and the county defendants subsequently stipulated the trial court's March 17, 2004 order on the demurrers interposed by the court defendants "will be deemed applicable" to the county defendants.

CONTENTIONS

Petitioners contend that in light of the United States Supreme Court's decisions in *Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156 [141 L.Ed.2d 174] (*Phillips*) and *Brown v. Legal Foundation of Wash.* (2003) 538 U.S. 216 [155 L.Ed.2d 376] (*Brown*), the Court of Appeal's decision in *Fresno, supra,* 177 Cal.App.3d 403, is no longer good law, and their first cause of action states a claim for an unconstitutional taking of pre-exoneration interest without just compensation.

DISCUSSION

1. *Standard of appellate review.*

In determining whether a plaintiff has properly stated a claim for relief, "our standard of review is clear: '"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our review is de novo. (*Ibid.*)

2. *Pertinent case law.*

a. *Fresno held depositors are not entitled to the interest earned on cash bail deposits in criminal actions.*

In *Fresno, supra,* 177 Cal.App.3d 403, a firefighters association filed a class action on behalf of all public and private cash depositors in court proceedings to compel return of all interest earned on monies deposited with the courts of Fresno County. (*Id.* at p. 406.) The lower court ruled the owners of all cash court deposits are entitled to the interest earned on the money. (*Id.* at p. 405.)

The reviewing court affirmed the lower court's ruling concerning cash deposits in civil actions but reversed as to interest on cash bail deposits in criminal proceedings. (*Fresno, supra,* 177 Cal.App.3d at p. 406.)

With respect to interest on cash deposits in civil actions, *Fresno* held such deposits are controlled by the superior court and that the superior court is the owner of any interest earned thereon, but the court's ownership is that of a trustee for the person who is ultimately entitled to receive the deposited money. (*Fresno, supra,* 177 Cal.App.3d at p. 409.) *Fresno* concluded the owners of all cash deposits in civil actions within the three-year period before the filing of the firefighters' complaint were entitled to the interest earned on their monies while on deposit in the general fund of the county. (*Ibid.*)

On the other hand, with respect to interest earned on cash bail deposits in criminal actions, *Fresno* held the county's retention of interest accrued on such deposits "is not an unconstitutional taking of private property." (*Fresno, supra,* 177 Cal.App.3d at p. 413.) *Fresno* reasoned that bail money is deposited for a *public purpose,* namely,

securing a defendant's appearance, and the interest earned thereon is reasonably needed to support the court system. (*Id.*, at p. 412.)

Fresno explained, "[T]he California Legislature has declared that the interest earned on any bail money deposited in criminal proceedings may, if the board of supervisors so directs, be used by the county for the support of the courts of that county. (Gov. Code, §53647.5.)[*] This is a reasonable need since the operation of the courts is essential to the 'general welfare' of the people. Further, unlike cash deposits in civil cases ... where the money is deposited only for the benefit of a private person or entity, bail money is deposited for a public purpose – security for the appearance of the defendant at all required court hearings. This arises because the public as well as the defendant is entitled to the orderly determination of the truth or falsity of the charges against the defendant. If the defendant fails to appear, the bail money is forfeited to the county to help defray the costs of apprehending the defendant. Since the public has a vested interest in the defendant's appearance at all court hearings, it has a vested interest in the bail money deposited to secure that appearance. Hence, the *public purpose* of bail justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court. [Citations.]" (*Fresno, supra,* 177 Cal.App.3d at p. 412.)

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[*] The record in *Fresno* did not reflect whether the Fresno County Board of Supervisors had directed that interest earned on bail money be allocated to the support of the county courts, but *Fresno* took "judicial notice of the need of all of the counties in California for moneys to operate their courts." (*Fresno, supra,* 177 Cal.App.3d at p. 410.)

Petitioners contend *Fresno* is no longer good law in that in *Phillips, supra,* 524 U.S. 156, and *Brown, supra,* 538 U.S. 216, the United States Supreme Court "overruled *sub silentio,* the legal underpinning of the Court of Appeal's decision in *Fresno Fire Fighters v. Jernagan.*" We now turn to those cases.

b. *Phillips held the interest earned on a lawyer's trust account is the private property of the client.*

In *Phillips, supra,* 524 U.S. 156, the plaintiffs challenged the constitutionality of the Texas Interest on Lawyers Trust Account (IOLTA) program. Under the IOLTA program, certain client funds held by an attorney in connection with his or her practice of law were deposited in bank accounts, with the resulting interest paid to foundations that finance legal services for low income individuals. (*Id.,* at pp. 159-160.) The plaintiffs alleged the IOLTA program violated their rights under the Fifth Amendment by taking their property without just compensation. (*Id.*, at p. 163.)

The Supreme Court noted the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, "provides that 'private property' shall not 'be taken for public use, without just compensation.' Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' [Citation.] [¶] All agree that under Texas law the principal held in IOLTA trust accounts is the 'private property' of the client. [Citations.] . . . The question in this case is whether the interest on an IOLTA account is 'private

property' of the client for whom the principal is being held." (*Phillips, supra*, 524 U.S. at pp. 163-164.)

The high court relied on the established common law rule that "'interest follows principal.'" (*Phillips, supra*, 524 U.S. at p. 165.) The court continued, "Indeed, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980), we cited . . . the general rule that 'any interest . . . follows the principal.'" (*Phillips, supra*, at p. 166.)

In *Webb's*, the high court addressed "a Florida statute providing that interest accruing on an interpleader fund deposited in the registry of the court '"shall be deemed income of the office of the clerk of the circuit court."' [Citations.] The appellant in that case filed an interpleader action in Florida state court and tendered the sum at issue, nearly $2 million, into court. In addition to deducting $9,228.74 from the interpleader fund as a fee 'for services rendered,' the clerk of [the] court also retained the more than $100,000 in interest income generated by the deposited funds. [*Webb's*] held that the statute authorizing the clerk to confiscate the earned interest violated the Takings Clause. As [the court] explained, 'a State, by *ipse dixit*, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.' [Citation.]" (*Phillips, supra*, 524 U.S. at pp. 166-167.)

In *Phillips*, the United States, as amicus curiae, further argued that "'private property' is not implicated by the IOLTA program because the interest income generated by funds held in IOLTA accounts is 'government created

value.'" (*Phillips, supra*, 524 U.S. at p. 170.) *Phillips* disagreed, stating, "the State does nothing to create value; the value is created by respondents' funds." (*Id.* at p. 171.)

Phillips noted, however, "[t]his would be a different case if the interest income generated by IOLTA accounts was transferred to the State as payment 'for services rendered' by the State. [Citation.] Our holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income. [Citations.] But here the State does not, indeed cannot, argue that its confiscation of respondents' interest income amounts to a fee for services performed. Unlike in *Webb's*, where the State safeguarded and invested the deposited funds, funds held in IOLTA accounts are managed entirely by banks and private attorneys." (*Phillips, supra*, 524 U.S. at p. 171.)

Phillips concluded "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." (*Phillips, supra*, 524 U.S. at p. 172.) *Phillips* did not express any view as to whether those funds had been "'taken'" by the State, or any opinion as to the amount of "'just compensation,'" if any, due the respondents, leaving those issues to be addressed on remand. (*Ibid.*)

c. *Brown held no just compensation was owed on IOLTA interest because the client-depositors did not suffer any pecuniary loss.*

As indicated, *Phillips* did not address whether the interest income on the IOLTA accounts had been "'taken'" by the State, or the amount of "'just compensation,'" if

any, due the respondents. (*Phillips, supra*, 524 U.S. at p. 172.) The Supreme Court confronted those questions five years later in *Brown, supra*, 538 U.S. at p. 220.

In *Brown*, the court found the interest generated on client funds deposited in IOLTA accounts was taken for a public use when it was turned over to the Legal Foundation of Washington, which used the proceeds for law-related charitable and educational purposes. (*Brown, supra*, 538 U.S. at pp. 224, 235.)

However, despite the taking, no compensation was owed. *Brown* explained that just compensation is measured by the property owner's pecuniary loss, rather than the government's gain. (*Brown, supra*, 538 U.S. at pp. 235-236.) The rules adopted by the Washington Supreme Court required lawyers and limited practice officers (LPOs)[8] to deposit client funds into IOLTA accounts only if the funds could not earn net interest for the client. (*Id.*, at pp. 224, 227.) Monies were to be deposited into IOLTA accounts when the funds "'are so nominal in amount or to be held for so short a period that the amount of interest that could be earned would not justify the cost of creating separate accounts. . . .'" (*Id.*, at pp. 223-224.) Conversely, the rules required lawyers and LPOs to deposit client funds in non-IOLTA accounts whenever those funds could generate net earnings for the client. (*Id.*, at p. 239.)

Because the client-depositors in *Brown* would not have earned any net interest on their funds (*Brown, supra*,

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[8] LPOs are nonlawyers who are licensed to act as escrowees in the closing of real estate transactions and like lawyers, often temporarily control the funds of their clients. (*Brown, supra*, 538 U.S. at p. 227.)

538 U.S. at p. 230), the compensation due them for any taking of their property was nil. (*Id.*, at p. 240.)

3. *Fifth Amendment principles implicated in IOLTA cases have no application here; the cash bail deposit was in the nature of a contract between the depositor and the government, and the terms of the contract did not include a provision for interest on the deposit.*

Petitioners' reliance upon *Phillips* and *Brown* is misplaced. Those cases involved the involuntary taking by the government of private property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use, namely, to fund legal services for low income individuals. Those circumstances implicate the Fifth Amendment, which requires the payment of just compensation when private property is taken for public use. However, those constitutional concerns are absent here.

The court defendants' refusal to pay petitioners interest on their cash bail deposits does not constitute a "taking" because there was no confiscation of private property by the court defendants for a public purpose, or at all. Rather, when petitioners voluntarily deposited cash bail to free the criminal defendants from custody, petitioners entered into contracts with the government by which petitioners guaranteed the appearance of the criminal defendants released on bail at all required court proceedings.

A bail transaction is a contract. It is established that "[a] bail bond is in the nature of a contract between the government and the surety; the surety acts as a guarantor

of the defendant's appearance under risk of forfeiture of the bond. [Citation.] The surety guarantees that the defendant will appear at the specific time and place and if the defendant fails to appear at the specified time and place, the surety is absolutely indebted to the state for the amount of the bond. [Citation.] The scope of a surety's contractual obligation under the appeal bond is defined by applicable statutory law and language of the bond itself. [Citation.]" (*People v. Allen* (1994) 28 Cal.App.4th 575, 581; accord, *People v. Amwest Surety Ins. Co.* (1991) 229 Cal.App.3d 351, 356 ["bail bond is in the nature of a contract between the government and the surety"]; *People v. Doe* (1959) 172 Cal.App.2d Supp. 812, 813 ["[t]he obligation of the bail bond is contractual"]; *United States v. Lujan* (9th Cir. 1978) 589 F.2d 436, 438 ["bail bond is a contract between the government and the defendant and his surety"].)

Although the case law typically involves bail bonds, rather than cash bail deposits,[6] that is a distinction without a difference for purposes of the discussion herein. The statutory scheme provides various alternatives for posting bail. A defendant may be released from custody upon (1) execution of a bail bond or undertaking of bail by an admitted surety insurer (Pen. Code, § 1276);[7] (2) deposit by the defendant or any other person of cash in the amount of the bail (§§ 1295, 1296); (3) deposit by the defendant or any other person of bonds of the United States or State of California "of the face value of the cash deposit required"

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[6] However, we note that in *United States v. Lujan, supra*, 589 F.2d at p. 437, one of the appellants posted a cash bond.

[7] All subsequent statutory references are to the Penal Code, unless otherwise specified.

(§ 1298); or (4) provision by the defendant or any other person of equity in real property equal to twice the amount of the cash deposit required (§ 1298). Irrespective of the particular type of security given for the defendant's release, the obligation of the parties is contractual.

Accordingly, the obligation herein is contractual in nature and is defined by statute as well as by the language of the contract. (*People v. Allen, supra*, 28 Cal.App.4th at p. 581.)

The statutory scheme governing bail, section 1268 et seq., does not require the payment of interest on cash bail deposits. The Legislature has made no provision therefor.

Likewise, the written contracts herein, evidenced by standard form bail receipts, do not include a provision that interest will be paid on cash bail deposits. With respect to the obligations of the parties, the bail receipts simply provide: "**NOTICE:** The above deposited bail will be forfeited if the defendant fails, at any time, to render himself or herself available to the orders and process of the court; and, if convicted, failure to appear for Pronouncement of Judgment or Grant of Probation."

Thus, the quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody. The contracts did not include a provision that petitioners would earn interest on the cash bail deposits. Now, after the bail was exonerated, petitioners would have the contracts rewritten to award them additional consideration in the form of interest on the bail between the date of deposit and the date of exoneration. Such a modification has no basis in contract law and must be rejected.

Therefore, petitioners are incapable of stating a cause of action for denial of pre-exoneration interest on their cash bail deposits. The trial court properly sustained the demurrer to the first cause of action without leave to amend.

4. *The Fresno decision overlooked applicable contract law principles.*

Finally, after resolving this matter pursuant to ordinary principles of contract law, we revisit the *Fresno* decision. There, the court held a county's retention of interest accrued on cash bail deposits in criminal proceedings is not an unconstitutional taking of private property. (*Fresno, supra*, 177 Cal.App.3d at p. 413.) The *Fresno* court reasoned that bail money is deposited for a public purpose, namely, securing a defendant's appearance, and the interest earned thereon is reasonably needed to support the court system. (*Id.*, at p. 412.)

With respect to pre-exoneration interest, *Fresno's* rejection of a claimed right to interest on cash bail in criminal proceedings is correct in result.[8] However, we take issue with *Fresno's* rationale. The reason there is no right to pre-exoneration interest on cash bail is not that the money was deposited for a public purpose. Rather, no interest is owed because the bail deposit is made in accordance with the terms of a particular contract and the terms of that contract do not include a provision for pre-exoneration interest.[9]

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[8] The issue of post-exoneration interest is not before us.

[9] As discussed above, the *Fresno* court held that although depositors of cash bail in criminal proceedings have no right to the accrued

(Continued on following page)

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is denied. No costs are awarded in this proceeding. (Cal. Rules of Court, rule 56.)

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

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interest, the owners of cash deposits in *civil* proceedings are entitled to the interest earned on their moneys. (*Fresno, supra,* 177 Cal.App.3d at p. 409.) Interest on cash deposits in civil proceedings is beyond the scope of this opinion. However, we observe that unlike cash deposits in criminal matters, cash deposits in civil cases are not contractual in nature and therefore are not governed by contract law principles. For example, Code of Civil Procedure section 529 provides that upon granting an injunction, "the court . . . must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages . . . the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." Similarly, Code of Civil Procedure section 1030 provides that "[w]hen the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may . . . apply . . . for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding." Such undertakings, or deposits in lieu of undertakings, are required by statute and are given to protect the opposing party in the litigation; they are not in the nature of a contract between the depositor and the court or the opposing party.

Court of Appeal, Second Appellate District,
Division Three – No. B175442

S132137

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed May 11, 2005)

MARK E. OVERLAND et al.,
Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent;

COUNTY OF LOS ANGELES et al.,
Real Parties in Interest.

Petition for review DENIED.

GEORGE
Chief Justice

California Statutes

California Government Code section 53647.5. Notwithstanding any other provision of law, interest earned on any bail money deposited in a bank account pursuant to Section 1463.1 of the Penal Code and Section 53679 of this code shall, if the board of supervisors so directs, be allocated for the support of the courts in that county.

California Penal Code section 1295. (a) The defendant, or any other person, at any time after an order admitting defendant to bail or after the arrest and booking of a defendant for having committed a misdemeanor, instead of giving bail may deposit, with the clerk of the court in which the defendant is held to answer or notified to appear for arraignment, the sum mentioned in the order or, if no order, in the schedule of bail previously fixed by the judges of the court, and, upon delivering to the officer in whose custody defendant is a certificate of the deposit, the defendant must be discharged from custody.

(b) Where more than one deposit is made with respect to any charge in any accusatory pleading based upon the acts supporting the original charge as a result of which an earlier deposit was made, the defendant shall receive credit in the amount of any earlier deposit.

(c) The clerk of the court shall not accept a general assistance check for this deposit or any part thereof.

California Penal Code section 1296. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in

the recognizance, and upon the deposit being made the bail is exonerated.

California Penal Code section 1297. When money has been deposited, a receipt shall be issued in the name of the depositor. If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk shall, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying restitution to the victim or the Restitution Fund, fines, and costs, shall refund the surplus, if any, to the defendant. If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail.

No. 05-194

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In The
Supreme Court of the United States

MARK E. OVERLAND; PAMELA POLOSKI;
AND OVERLAND & BORENSTEIN,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California
Second Appellate District

BRIEF IN OPPOSITION

MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP
EDWIN A. LEWIS, State Bar No. 101699
Counsel Of Record
SYLVIA HAVENS, State Bar No. 137447
660 So. Figueroa Street, 23rd Floor
Los Angeles, California 90017
Telephone: (213) 624-6900

Attorneys for Respondents,
County of Los Angeles and
J. Tyler McCauley

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Do Petitioners have standing to force payment of interest on a cash deposit in lieu of bail even if Petitioners have no pecuniary interest in the cash principal?

2. Can a criminal defendant turn an arrest into an investment opportunity at the expense of the government? Because a cash deposit in lieu of bail is a matter of contract, can a criminal defendant re-write the contract such that the criminal defendant can force interest from Respondents who never agreed to pay interest?

3. If a criminal defendant voluntarily elects to make a cash deposit in lieu of bail, instead of proceeding with other more costly alternatives, does that criminal defendant have the right to force payment of interest?

LIST OF PARTIES

Petitioners did not set forth the required List of Parties. Therefore, Respondents present the following list:

Petitioners:	Mark E. Overland, Pamela Poloski and Overland & Borenstein LLP.
Respondents:	County of Los Angeles, J. Tyler McCauley, Superior Court of California for Los Angeles County and John A. Clarke.

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STATUTES:

Cal. Code of Civil Procedure Section 367 3

OPINIONS BELOW

Please see Petitioners' discussion of the opinions and orders below, entitled "Opinion Below."

JURISDICTION

This Court lacks jurisdiction because Petitioners lack standing.

STATUTES OR OTHER PROVISIONS INVOLVED

Please see Petitioners' discussion of the statutes and other provisions involved in the discussion entitled "Constitutional and Statutory Provisions."

STATEMENT OF THE CASE

Contrary to Petitioners' position, being charged with a crime does not present the defendant with an investment opportunity at the expense of the taxpayers. The Constitution of the United States guarantees the accused the right to non-excessive bail but *not* the right to earn interest on someone else's money.

Petitioners are an attorney (Mark Overland), a "legal assistant, certified paralegal" (Pamela Poloski) and a law firm (Overland & Borenstein). Petitioners were hired to represent certain criminal defendants.[1] These criminal

[1] Pamela Poloski is described in the underlying complaint only as "a resident of the County of Los Angeles." Ms. Poloski is not listed as an

(Continued on following page)

defendants were in custody with bail having been set in various amounts. In no case were Petitioners required to deposit any amount for bail. In no case did Petitioners establish that they actually did post any amount of their own money as bail.

Petitioners mistakenly assert that "there are more than 1 million cash bail depositors subject to this litigation." Petition, p. 4. There has never been any evidence to support such an assertion and Petitioners did not pursue class certification. Therefore, there are only *three* cash bail depositors who are subject to this litigation, and none of the three has standing.

Because Petitioners owed no obligation to post bail, and because Petitioners did not use their own money to post bail, Petitioners lack standing. Moreover, because there is no right to extort interest from a party which did not agree to pay interest, there is no Fifth Amendment taking issue presented with the deposit of cash in lieu of bail.

REASONS FOR DENYING THE WRIT

Petitioners lack standing, cannot establish that a taking occurred and no just compensation would be due even in the event of a taking.

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attorney with the California State Bar nor is she identified as one of the criminal defendants for whom bail was posted. On the web site for Overland, Borenstein, Scheper & Kim LLP, Pamela Poloski is identified as "Legal Assistant, Certified Paralegal." *See* http://www.obsklaw.com.

ARGUMENT

1. PETITIONERS LACK STANDING

"Before reaching a decision on the merits, [courts must] address the standing issue to determine if [the courts] have jurisdiction." *Nat'l Wildlife Fed'n v. Adams*, 629 F.2d 587, 593, n. 11 (9th Cir. 1980).

> "The standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This Court has set forth the following three requirements for standing:

> "(1) 'a plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical;' (2) 'there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court;' and (3) 'it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); citations omitted and alterations in original.

California's Code of Civil Procedure, Section 367 sets forth a similar standing requirement: "Every action must be prosecuted in the name of the real party in interest,

except as otherwise provided by statute." *See also, Holmes v. California National Guard*, 90 Cal.App.4th 297, 315 (2001):

> "To have standing, a party must be beneficially interested in the controversy, that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' The party must be able to demonstrate that he or she has some such beneficial interest that is *concrete and actual* and not conjectural or hypothetical." *Id.*, at p. 315.

A detailed standing analysis similar to the one required here was performed in *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835 (9th Cir. 2001), affirmed *Brown v. Legal Found.*, 538 U.S. 216 (2003). There, four plaintiffs claimed to have standing to challenge the State of Washington's program of using interest on certain attorney trust accounts for charitable legal services (known as IOLTA programs). The Ninth Circuit found only two of the four individuals had standing.

Of the two found to have standing, each was able to show that the principal and the interest belonged to them. One argued that he "owned the principal that was placed in . . . [the] account" and therefore, "the 'interest income' earned on that principal is his property and therefore he has standing to challenge the IOLTA program." *Id.*, at p. 847. So too with the second individual who "objects to anyone other than me taking the interest earned on my funds."

As for the two individuals who lacked standing, neither was able to show a right to the interest income which was alleged to have been wrongfully taken. One of

the improper plaintiffs was an escrow agent who claimed he "holds 'legal title' to the principal placed in the escrow account" and therefore had standing. The Ninth Circuit disagreed:

> "Although [an escrow agent] may have legitimate objections to the IOLTA program and may believe his clients are better served by disregarding its dictates, he does not own the principal that is deposited in the IOLTA accounts, and therefore, he has no claim to the generated interest. Without the requisite property right, [the escrow agent] lacks standing to challenge the IOLTA program on Fifth Amendment grounds." *Id.*, at p. 848.

Similarly, an escrow service agent who had to surrender her license as an indirect result of the IOLTA program was also found to lack standing.

Here, Petitioners have not established that they have standing. At best, Petitioners assert that they "deposited cash" (Petition, p. 4) – *not* that it was *their* cash, not that the principal belonged to them, only that they "deposited" the cash in exactly the same way as did the escrow agent found to lack standing in *Wash. Legal Found., supra.*

Moreover, the true facts are that Petitioner Mark Overland did not own the cash deposited on behalf of Defendant, Abdul Aziz Mohd Alkhelaifi. Petitioner Mark Overland was a mere conduit.[2] Because the principal did

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[2] Petitioner Mark Overland initially refused to answer questions regarding the source of the $500,000.00, citing attorney-client privilege. Later, Petitioner Mark Overland admitted that the money was not his but in fact belonged to his client, thereby establishing that Petitioner Mark Overland has no standing herein.

not belong to Petitioner Mark Overland, Petitioner Mark Overland is not entitled to any interest. Thus, Petitioner Mark Overland lacks standing.

The other two petitioners – Pamela Poloski and Overland & Borenstein – similarly have failed to establish that they had an ownership interest in the cash deposited as bail. *See, e.g.*, Petition, p. 4. Indeed, Pamela Poloski is described as a "legal assistant, certified paralegal" on her firm's web site. There is no allegation that Ms. Poloski owned the principal just as there is no such allegation for Overland & Borenstein.

Since Petitioners have failed to establish that they have an ownership interest in the cash deposited in lieu of bail, Petitioners cannot establish that they have been damaged and, thus, Petitioners do not have standing to bring this lawsuit.

2. THERE WAS NO "TAKING" TO IMPLICATE THE FIFTH AMENDMENT

> "[T]he court defendants' refusal to pay petitioners pre-exoneration interest on their cash bail deposits does not constitute a 'taking' because there was no confiscation of private property by the court defendants for a public purpose, or at all." App., p. 2.

So correctly concluded the California Court of Appeal in the pending case. There was no "taking" here because (a) a cash bail deposit is a matter of contract and does not raise Fifth Amendment concerns; (b) Petitioners voluntarily gave up possession, control and use of the cash; (c) Petitioners' unilateral and unreasonable expectation does

not create a property interest; and (d) a limitation on the use of a cash deposit is not a taking.

a. A Cash Bail Deposit Is A Matter Of Contract And Does Not Raise Fifth Amendment Concerns

As the California Court of Appeal recognized, "[a] bail transaction is a contract." App., p. 13. Therefore, the obligations of the parties are defined by contract. Because the parties' contractual terms here did "not require the payment of interest on cash bail deposits," no interest is owed. App., p. 15.

> "Thus, the quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody. The contracts did not include a provision that petitioners would earn interest on the cash bail deposits. Now, after the bail was exonerated, petitioners would have the contracts rewritten to award them additional consideration in the form of interest on the bail between the date of deposit and the date of exoneration. Such a modification has no basis in contract law and must be rejected." App., p. 15.

Petitioners deposited cash in lieu of bail in order to gain their clients' liberty pending their clients' trials. Petitioners made these deposits without any contractual provision that they would be paid interest. Petitioners cannot now modify the terms of the agreement into which they voluntarily entered.

b. Petitioners Had No Property Right To Interest Earned On Cash Bail Because As A Term Of Bail, Petitioners Voluntarily Gave Up Possession, Control And Use Of The Cash

Property "consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of'" the property. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998), citing *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945).

Here, Petitioners possessed none of the critical "group of rights" to the cash deposits at issue here. Significantly, Petitioners no longer had the "right to use" the cash. Bail would not be bail if a criminal defendant could still use the property. So, a defendant cannot invest the cash, cannot buy stock with the cash, and cannot put the cash into the bank to earn interest.

As this Court has already accurately observed, when cash is deposited as bail, the depositor loses the right and opportunity to earn interest:

> "One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. And one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit of the State." *Schilb v. Kuebel*, 404 U.S. 357, 367 (1971).

Petitioners did not have a property right to any earned interest because Petitioners voluntarily gave up their right to use the cash while it was being held as a deposit in lieu of bail.

c. Petitioners' Unilateral And Unfounded Expectation Does Not Create A Property Interest

"[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Here, Petitioners did not even have a unilateral expectation of receiving interest on cash deposited in lieu of bail. The interest would not belong to Petitioners because the principal did not belong to Petitioners. Therefore, Petitioners would not be entitled to interest under any scenario.

Even if the cash belonged to Petitioners, they still would not have an expectation of receiving interest. Nothing in California's statutory bail scheme nor in its documentation would lead anyone to believe that interest would be paid on bail. Indeed, for hundreds of years, precisely the opposite has occurred.

In *Webb's*, the creditors did have "more than a unilateral expectation" because the interpleaded funds at issue there were "held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county." *Ibid.* Here, the precise opposite is true: bail is not held solely for the benefit of the criminal defendant. Bail is held "for the benefit of the court" and "for the benefit of the county" in order to offer some guarantee that the criminal defendant will appear for trial. Thus, the California Court of Appeal recognized that "the *public purpose* of bail justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court." *Fresno Fire Fighters Local 753 v. Jernagan*, 177

Cal.App.3d 403, 412 (1986); italics in original, citations omitted.

The criminal defendant has a reasonable "expectation" of being released if the proper bail is posted but the criminal defendant does *not* have an expectation of making a reasonable rate of return on the posted cash. Bail is not an investment opportunity.

d. A Limitation On The Use Of A Cash Deposit Is Not A Taking

This Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values" without effecting a taking. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

> "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

Thus, it does not amount to a "taking" for the government to prohibit landlords from evicting tenants who are unwilling to pay a higher rent. *Block v. Hirsh*, 256 U.S. 135 (1921). In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), it was not considered a "taking" for

the government to require certain gold mines to cease operations during wartime.

Similarly, there is no "taking" when the government bans certain private uses of a portion of private property. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). A government can also, without effectuating a "taking," ban private use of certain airspace. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Here, there is no Fifth Amendment concern because there was no "taking." At best, the government only has prohibited a criminal defendant "from making certain uses of her private property." Specifically, a criminal defendant cannot buy stock with money used to post bail. A criminal defendant cannot put such money in the bank. Instead, a defendant's "use" of the money is limited to being held by the court while the criminal defendant waits for trial.

Moreover, when a person deposits cash into a checking account which bears no interest according to the terms of the contract agreed to by the depositor and the bank, the depositor cannot be heard to complain that the bank used the deposited funds to earn interest for the bank only.

So too here. Certain criminal defendants were given the option of remaining in custody until trial or posting sufficient bail so as to give some guarantee of the criminal defendant's appearance at trial. No California criminal defendant is given the option of posting bail with interest being earned thereon.

e. No Just Compensation Is Owed To Petitioners

> "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found.*, 538 U.S. 216, 231-232 (2003).

Often referred to as the Just Compensation Clause, the final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." *Ibid.*, at n. 6.

Here, even assuming a taking, still no just compensation would be owed.

When a criminal defendant is allowed to post bail, the defendant has several available options. Which one of the following the criminal defendant chooses is entirely up to the defendant:

- The criminal defendant can use a bail bond company, thereby not having to come up with the entire amount of the bail. Bond companies, however, charge a price for their services – a rate of 10% of the amount of the bail is not surprising and still, the entire amount must be collerarized. Significantly, the 10% fee is irretrievable.
- The criminal defendant can post a property bond, up to 200% of the bail required – and not have to part with the use of any money.
- The criminal defendant can borrow money such that the entire bail amount can be posted without any outlay by the criminal

defendant. (The courts have no way of tracing the source of the cash posted.)

- The criminal defendant can use his/her own money and deposit with the court the entire amount of the bail. When using this option, the defendant is able to avoid a bond fee or burdening a friend/relative but does lose the beneficial use of the money while it is being held as bail.

Here, Petitioners suffered no pecuniary loss. If, for example, defendant Mr. Alkhelaifi had used a bail bond company instead to post his $500,000 bail, the bail bond company would have charged 10% – i.e., $50,000. This fee would have been nonfundable – gone whether the bond was posted for one day or one year. Instead of a guaranteed loss of $50,000, Petitioners admit that "the Overland deposit . . . likely earned nearly $25,000 in interest." Thus, there was a net *savings* of $25,000 by depositing cash with the court rather than using a bond company. Alternatively, Defendant Alkhelaifi could have used a property bond which would have cost next to nothing. Or, the criminal defendant could have remained in custody, also an option which would have caused no pecuniary loss.

Petitioners never had a contractual, a constitutional or a property right to earn interest on cash deposited in lieu of bail. Therefore, there was no "taking" to implicate the Fifth Amendment.

CONCLUSION

The constitutional concerns implicated by the Fifth Amendment do not arise here not only because Petitioners lack standing but also because there has been no taking for which just compensation would be due.

Respectfully submitted,

MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP
EDWIN A. LEWIS
SYLVIA HAVENS
Attorneys for Respondents, County of Los Angeles and J. Tyler McCauley

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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI, and OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

RESPONSE TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK A. BORENSTEIN
OVERLAND BORENSTEIN SCHEPER & KIM LLP
300 South Grand Ave.
Suite 2750
Los Angeles, CA 90071
Telephone: (213) 613-4655
Facsimile: (213) 613-4656

Attorneys for Petitioners Mark E. Overland, Pamela Poloski, and Overland & Borenstein LLP

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The arguments by Respondents County of Los Angeles and J. Tyler McCauley (the "County Respondents") for denial of the Petition are without merit and should be rejected. First, there is no legitimate standing objection here. The argument has *never* been raised before and there are no facts in the record that would support the wild allegations made by opposing counsel. Here, the *statute* which establishes cash bail deposits and requires its return to the person who deposited the cash, unambiguously gives the right to receive the principal amount of the cash bail *to the depositor.* Each of the Petitioners and every member of the class they represent was a cash bail depositor, who received back from the Respondents the principal amount of the deposit, but without the accrued interest, after the trial court exonerated the bail. Petitioners obviously have standing since they are persons on whom the statute confers standing.

None of Respondents' arguments on the merits withstand scrutiny. They amount to little more that repeated quotations from the Court of Appeal decision below. In contrast to a bail bond, there is no express or implied contract, and the precedents of this Court unquestionably establish that the interest earned belongs to the depositor of the principal which earned the interest. This is not a case about a potential "investment opportunity" by defendants, Opposition at 1, clever as that phrase is. Rather, it is a compelling example of a *per se* taking of personal property, used by the state for what may be a laudable purpose, but in circumstances where the social benefit of general fiscal relief is not properly born by a discrete minority comprised of cash bail depositors. The Petition should be granted.

I. PETITIONERS HAVE STANDING.

A. The County Respondents Object to Petitioners' Standing for the First Time in This Court on the Basis of Unsupported Facts.

This Petition challenges the California Court of Appeal's refusal to overturn the trial court order sustaining the demurrer to Petitioners' complaint, *brought by other parties*. The County Respondents did not file a demurrer to Petitioners' state court complaint which, like a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, challenges the legal sufficiency of the complaint. Instead, the County Respondents answered the complaint. In their answer, the County Respondents alleged several affirmative defenses, but did not assert in their answer, or in any of their subsequent papers in the courts below, that Petitioners lacked standing. *See* Answer of Defendants J. Tyler McCauley and the County of Los Angeles, filed on March 14, 2004. Nor did any of the other Respondents.

The claim that Petitioners lack standing is based solely on the County Respondents' recitation of unsupported alleged facts. On this basis alone, the Court should reject any alleged facts that are not in any of the opinions below and are not brought to this Court's attention by citation to the record below.

B. Even if This Court Considered the Standing Issue on the Basis of the Unsupported Facts, Petitioners Obviously Have Standing.

None of the Respondents ever objected to Petitioners' standing for very good reason! As the Court of Appeal recognized, the Petitioners (and the class of cash bail

depositors they represent[1]), have pleaded that they made cash bail deposits and Respondents failed to return those deposits with the actual earned interest in violation of the Fifth and Fourteenth Amendments. *See Overland v. Superior Court*, 126 Cal. App. 4th 131, 134-35 (2005); Pet. App. 2-6. Under California law, these allegations must be accepted as true for purposes of demurrer, and the Court of Appeal did so. *Id.* at 6. This Court should do likewise. The allegations in the complaint unquestionably establish standing, for pleading purposes, since they seek the interest earned on the cash deposits each Petitioner made and which must be returned to them by statute.

The County Respondents claim that Petitioners lack standing because they are not the "owners" of the cash bail deposited and therefore have suffered no cognizable injury. Opposition 3-6. But under the California bail statutes, just like in other states[2], the person to whom Respondents are *statutorily mandated* to return exonerated cash bail is the cash bail *depositor*. No one else can claim the cash deposit

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[1] The Court Respondents statement that "Petitioners did not pursue class certification," Opposition at 2, is curious since the entire case was stayed in the trial court, pending final review of the demurrer ruling, so that there has been no opportunity to move for class certification. *See* Order Staying Action Pending Ruling on Plaintiffs' Petition for Writ of Mandate, filed July 27, 2004. The County Respondents' complaint that "there has never been any evidence to support" Petitioners' claim that "there are more than 1 million cash bail depositors subject to this litigation," is disingenuous. In related litigation, the County Respondents acknowledged that during a shorter period of time than covered by this litigation, there were more than 750,000 cash bail depositors in Los Angeles County who were not paid interest on their cash bail deposit. *See John C. Clarke v. Superior Court*, Cal. Ct of Appeal B166922 (2d Dist.), County Respondents' Petition for Writ of Mandate denied 5/15/03.

[2] *See, e.g.*, Alaska Rules of Court, Rule 41(d) (Ala. 2005); Colo. Rev. Stat. § 16-4-109 (Colo. 2005); Idaho Code § 19-2923 (Idaho 2005); N.J. Stat. Ann. § 3:26-4 (NJ 2005); N.Y. Crim. Proc. Law § 520.15(c) (NY 2005); Pa. Stat. Ann. tit. 234 § 535 (PA 2005); and W. Va. Code § 62-1C-12 (W. Va. 2005).

and the statute does not authorize any inquiry by Respondents into how the depositor acquired the cash or what the source of the cash was. For example, California Penal Code section 1297 provides in part:

> When money has been deposited, a receipt shall be issued in the name of the *depositor*. . . . If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the *depositor* of the exoneration of bail.

Cal. Penal Code § 1297 (2005) (emphasis added). *See* Cal. Penal Code § 1188 (trial court is required to refund the deposit to "the person or persons found by the court to have deposited said money on behalf of said defendant.")

The County Respondents' admission that Petitioners have asserted "they deposited cash," Opposition at 5, establish the very injury in fact they claim Petitioners lack. Petitioners have been deprived of the return of interest on the cash that state law mandates be returned to them. At the least, these facts alone establish "an invasion of a legally protected interest," Opposition at 3, namely the refusal to return interest (which this Court has repeatedly declared "follows principal," *see* Pet. at 9-14 and Section II(A) *infra*), where state law demands that the principal promptly be returned to them, *as the depositor.*

Respondents mistakenly rely on the Ninth Circuit opinion in *Washington Legal Foundation v. Legal Found. of Washington*, 271 F.3d 835 (9th Cir. 2001), *aff'd, Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). The circuit court rejected the standing of an escrow agent who had "legal title" to the principal in the escrow account because, under Washington law, "legal title" did not

include "any valuable beneficial interests. *See, e.g., Lee v. Wrixon*, 37 Wash. 47, 79 P. 489, 490 (1905)." *Washington Legal Foundation v. Legal Found. of Washington*, 271 F.3d at 848.

Under California law, however, Respondents have the duty to return cash bail to the *depositor*. If the depositor and the owner are different, state law mandates that the cash bail is returned to the depositor. It is therefore the *depositor*, unlike the escrow agent in Washington State, who suffers injury when deprived of the interest on the returned cash bail deposit.

In addition, the County Respondents refer to California Civil Procedure Code section 367 which establishes that all civil actions must be prosecuted by "the real party in interest." *See* Opposition at 3-4. But that statute recognizes that any party who is beneficially interested in the controversy satisfies the "real party in interest" requirement. So, for example, an assignee of a litigation claim satisfies the "real party" requirement, *see* Cal. Civ. Proc. Code §§ 368 and 368.5; *Builders' Control Service, Inc. v. North American Title Guaranty Co.*, 205 Cal. App. 2d 68, 76 (1962), as do those persons who have a right to sue under the substantive law. *See* 4 Witkin, Cal. Proc. Pleading § 104 (4th ed. 2004). Under the substantive law, only the cash bail depositor can enforce that statutory duty to return the bail deposit. Petitioner Overland's standing also rests on the assignment for value of the litigation claim against Respondents, information previously provided to counsel for the County Respondents.

As Respondents concede, Petitioners have established they each deposited the cash in question, and they were unconstitutionally deprived of the interest thereon. They have suffered "an injury in fact."

II. THERE WAS A "TAKING" IMPLICATING THE FIFTH AMENDMENT.

A. The Interest Earned on the Cash Bail Deposit Is An Interest in Petitioners' Property.

Respondent argues that there can be no Fifth Amendment Taking because of the "implied contract" found by the Court of Appeal that does not require the payment of interest on cash bail deposits. Opposition at 7. However, they cite to nothing more than the Court of Appeal decision which is the subject of this Petition.

In any event, the argument ignores, as the Court of Appeal did, this Court's explicit holding in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the Texas IOLTA rules specifically divested clients of the interest income in the IOLTA accounts. Nevertheless, this Court held that "a State, by *ipse dixit*, may not transform private property into public property without compensation simply by legislatively abrogating the traditional rule that earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 167, *citing Webb's Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (internal quotes omitted).

Here, the Court of Appeal does exactly that – convert by judicial fiat the interest actually earned on the cash bail deposit into public property, thereby purporting to bypass completely the Fifth Amendment. The very same implied contract analysis could have converted to public money the interpleader cash in *Webb's Fabulous Pharmacy*, or in the inmate funds in *Schneider v. California Department of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003), or even the IOLTA deposits in *Brown* and *Phillips*. The designation of the arrangement as an implied contract does nothing more than "transform private property into public property without compensation."

The County Respondents fail to point to any exception to the general rule established in the common law since the mid 1700's that "interest follows principal." *See Phillips*, 524 U.S. at 165. Indeed, California is in accord with the unanimous endorsement of this principle by American courts. *See Breda Costruzioni Ferroviane v. Los Angeles County Metro. Trans. Auth.*, 56 Cal. App. 4th 1433, 1439 (1997); *Pomona City Sch. Dist. v. Payne*, 9 Cal. App. 2d 510, 516 (1935).

B. Petitioners Have a Property Right to Interest Earned on Cash Bail Deposit.

In support of their argument that Petitioners have no property right to interest earned on cash bail, Respondents cite to this Court's decision in *Schilb v. Kuebel*, 404 U.S. 357 (1971). Opposition at 8. *Schilb* was *not* a takings decision at all and did not consider any challenge on that basis. Instead, on due process and equal protection grounds – issues not asserted by anyone in this case – the Court held that Illinois did not offend due process and equal protection rights when it provided bail through a number of different statutory schemes which had different economic consequences to the person seeking release on bail. Undoubtedly, the California statutory scheme, like the Illinois bail system in *Schilb*, passes due process and equal protection muster. But that concession says nothing whatever about the County Respondents confiscating actually earned interest and thereby violating the takings clauses of the California and United States Constitution.

The Court noted in passing that under the cash bail deposit part of Illinois' bail statutes that "presumably, at least, its interim possession by the State accrues to the benefit of the State." *Id.* at 367. This statement merely states the obvious – from the date the cash bail is deposited until its mandated return, the State holds the cash deposit as security for the appearance of the defendant.

Thus, like any pledge of security, the incidents of possession are temporarily impaired. But the implication of this *dicta* is that the interference with the principal sum of cash is temporary and that the depositor's underlying *ownership* is not compromised. Indeed, the depositor's ownership cannot be divested in Illinois, or in California, unless and until statutorily mandated judicial forfeiture has occurred. *See* Cal. Penal Code §§ 1305-1308; 725 Ill. Comp. Stat. § 5/110-8(g).

Besides, no one is challenging the interference with the *principal* which plainly occurs. The only challenge made here is to the *interest* earned on the principal, which is not included in the bail amount and is not impaired. Certainly there has been no contention by any of the Respondents that the interest earned becomes part of the security for the defendants' appearance. Moreover, nothing in the statement in *Schilb* undercuts the "interest follows principal" rule and it is certainly not a holding by this Court that the depositor has lost all property rights in the deposit.

C. Petitioners' Rights to Interest is Not Based on a Unilateral and Unfounded Expectation.

Petitioners' right to the interest actually earned is based on California's and the common law's long-standing rule that "interest follows principal." *See Phillips*, 524 U.S. at 165. It is not an "unfounded expectation."

Nor does the right to their property turn on whether the interest is taken for a good "public purpose," citing *Fresno Fire Fighter Local 753 v. Jernagan*, 177 Cal. App. 3d 403, 412 (1986). A public purpose is a necessary condition for lawfully exacting a *per se* taking of private property, but the public purpose does not excuse compliance with the Fifth Amendment and the payment of just compensation. Here, just like in *Brown* and *Phillips*, there was

a categorical taking of the accrued interest – not just an interference with its use – and no amount of public purpose can justify the absence of compensation.

Indeed, the crux of this Petition is that the California Court of Appeal in this case erroneously decided that this Court's decisions in *Phillips* and *Brown* overruled the legal underpinnings of *Fresno Firefighters*. *See Overland*, 126 Cal. App. 4th at 138-140 (2005). Therefore, reliance on *Fresno Firefighters* begs the question.

D. The Taking in This Case is Not a Regulatory Taking.

The County Respondents also attempt to justify their position by the untenable argument that the confiscation of interest in this case is a mere "regulatory" taking. Opposition at 10-11. But the regulatory taking analysis is inapplicable. Taking the interest actually earned is not a mere interference with the owner's beneficial use of the principal, as urged by Respondent County, but rather the *per se* physical taking of the owner's property. *Phillips*, 524 U.S. at 172. The balancing of public and private interests to avoid a taking is inappropriate under a *per se* analysis. Under *Brown*, the *per se* approach is mandated because private property – the accrued interest – was unilaterally taken by the government for public use.

E. Petitioners are Owed Just Compensation.

The County Respondents also assert that no compensation is owed to Petitioners because they failed to avail themselves of statutory bail alternatives that would have avoided the unlawful Taking by the government.

But whatever other statutory alternatives exist, Petitioners have suffered a pecuniary loss by posting cash bail, as the California statutory scheme clearly allows, and losing the actual interest.

In any event, it is premature to speculate about whether Petitioners will eventually prove any actual damage as a result of the taking of their interest. None of the courts below reached that issue; all of them focused on the threshold question of whether private property was taken. If as Petitioners' suggest, the Court of Appeal wrongly decided this threshold issue, the matter should be remanded to the California courts for a determination, at trial, of the amount of compensation, if any, is due.

CONCLUSION

The County Respondents' late-stated standing argument is based on unsupported facts and should not dissuade this Court from granting certiorari on a vitally important Fifth Amendment question with widespread ramifications. This Court has repeatedly stated that interest earned on principal is the private property of the depositor. A State's appropriation of the interest actually earned on the temporary deposit of the principal for a public purpose is a *per se* confiscation that requires the trial court to determine what compensation, if any, is due. The California Court of Appeal's implied contract analysis transforms private property into public property by judicial fiat which is no more appropriate than if the legislature performed the same trick. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

OVERLAND BORENSTEIN
SCHEPER & KIM LLP
MARK A. BORENSTEIN

MARK A. BORENSTEIN
*Attorneys for Petitioners
Mark E. Overland; Pamela
Poloski; and Overland &
Borenstein LLP*